

Direct Appeals
28 U.S.C. § 158
BR Act Section 1233

Section 158 of the Judiciary Code (Title 28, U.S.C.) is amended to provide the circuit courts of appeal with discretion to accept bankruptcy appeals without an intermediate appellate decision. The circuit court may accept a direct appeal if the appropriate court or party(ies) certifies that direct appeal is necessary to resolve a matter of first impression, conflicting decisions, or public importance, or a matter that would materially advance the progress of the case.

The “material advancement” provision is quite broadly drafted and thus has the potential to significantly increase the number of requests for direct appeals.

A direct appeal from a decision of the bankruptcy court to the court of appeals can be taken:

- I. If the bankruptcy court, the district court, or the BAP, *sua sponte* or upon request of a party to the appeal, or all appellants or appellees acting jointly, certify(ies) that¹:
 - a. the judgment, order or decree being appealed from involves a question of law as to which there is no controlling decision from the appropriate court of appeals; OR
 - b. the judgment, order or decree involves a question of law requiring resolution of conflicting decisions; OR
 - c. an immediate appeal *may* materially advance the progress of the case;

AND

- the court of appeals authorizes the direct appeal.

- II. If the bankruptcy court, the district court, or the bankruptcy appellate panel determines that the circumstances in a, b, or c above, exist, OR receives a request from a majority of appellants and a majority of appellees for a certification, the

¹ The Group discussed whether the Rules Committee might create a Rule which would set out a deadline for certification under 28 U.S.C. § 158 (d) (2) (A), when the court certifies *sua sponte* or the parties jointly certify. Staff has since learned that the Appellate Subcommittee of the Bankruptcy Rules Committee, after consideration, came to the conclusion that there is no deadline and does not anticipate that a deadline will be imposed by rule.

appropriate court **shall** make the certification described in I, above (i.e., the specified courts have no discretion in these situations).

[NOTE: The Rules Committee’s Appellate Subcommittee is considering whether to create an official form for the certification]

- III. Parties may supplement the certification with a short statement of the basis for the certification.
- IV. In order to stay further proceedings, the appropriate court may issue a stay pending appeal.
- V. A request for direct appeal by a party or by a majority of appellants and a majority of appellees (i.e., not a joint certification by all appellants and appellees nor a sua sponte certification) must be made within 60 days after the entry of the judgment, order, or decree.
- VI. Pending the promulgation of national rules², section 1233(b) of the Act sets forth temporary procedural rules, including:
 - a. Authorized appeals must be taken in the manner prescribed in Rule 5 of the Federal Rules of Appellate Procedure;
 - b. The party requesting permission to appeal based on a certification under this section must file a petition with the circuit court no later than 10 days after the certification is received, with a copy of the certification attached.

OPEN ISSUES:

A new rule or rules may address the following issues:

- What constitutes the record on appeal for purposes of a direct appeal and the procedures for the bankruptcy court to transmit the record to the court of appeals;
- How the bankruptcy court can retain jurisdiction over the appeal in order to make the required certification;
- Whether a rule should require that a supplemental statement must be submitted with the petition requesting leave to appeal and impose a page

² The Rules governing direct appeals procedures for the bankruptcy courts will be incorporated into the 8000 series of the Federal Rules of Bankruptcy Procedure (currently titled “Appeals to District Court or Bankruptcy Appellate Panel”). Similar revisions will also have to be made to the Federal Rules of Appellate Procedure.

limit on such statement; and

- Should a party be limited to making only one request for direct appeal under this subsection.